

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TAMMY SCHOENLE,
Plaintiff,
v.
GSL PROPERTIES, INC.
Defendant

2:10-CV-2187 JCM (GWF)

ORDER

16 Presently before the court is defendant GSL Properties, Inc.’s (“GSL”) motion to dismiss.
17 (Doc. #6). Plaintiff Tammy Schoenle filed a response to defendant’s motion to dismiss the
18 complaint and a countermotion for leave to file first amended complaint (doc. #8). Attached to the
19 counter motion is plaintiff’s first amended complaint. (Doc. #8-3). The defendant has responded
20 with an opposition to plaintiff’s countermotion (doc. #13), as well as a reply in support of its motion
21 to dismiss (doc. #12).

22 Plaintiff's original complaint stems from the alleged harassment and discrimination she
23 suffered as a result of a rumor accusing her of having intimate relations with other co-workers on
24 the job (doc. #1). Plaintiff Schoenle claims her position at GSL was eliminated on January 19, 2010,
25 because of her gender. Furthermore, in retaliation for complaining about her discriminatory
26 treatment, she was allegedly forced to work in unsafe conditions (doc. #1).

27 Prior to initiating the suit, plaintiff filed a charge with the Equal Employment Opportunity

1 Commission (“EEOC”) on January 29, 2010, identifying “retaliation” as the sole basis for the charge
 2 of discrimination (doc. #12). In September of 2010, the EEOC sent plaintiff a dismissal and right
 3 to sue based on its finding that the commission was unable to determine any violation of the statute
 4 (doc. #12). Plaintiff, in addition to raising her retaliation charge, also raises other related charges
 5 against the defendant, in her complaint (doc. #1).

6 When an employee seeks judicial relief for incidents not listed in her original charge to the
 7 EEOC, the judicial complaint nevertheless may encompass any discrimination “like or reasonably
 8 related to” the allegations of the EEOC charge, including new acts occurring during the pendency
 9 of the charge before the EEOC. *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569 (9th Cir.
 10 1973). Thus, the court has subject matter jurisdiction over all of the plaintiff’s related claims.

11 Plaintiff’s amended complaint alleges (1) gender discrimination, (2) harassment or hostile
 12 work environment, (3) retaliation pursuant to Title VII of the Civil Rights Act of 1964, as amended
 13 42 U.S.C. § 2000e-2(a), (4) wrongful termination, and (5) intentional infliction of emotional distress
 14 pursuant to Nevada state law (doc. #8-3). Defendant moves to dismiss claims (1), (2), (4), and (5).
 15 (Doc. #12).

16 **I. Motion to Dismiss**

17 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
 18 as true, to ‘state a claim for relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
 19 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Where a
 20 complaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the
 21 line between possibility and plausibility of entitlement to relief.’” *Id.* (citing *Bell Atlantic*, 550 U.S.
 22 at 557). However, where there are well pled factual allegations, the court should assume their
 23 veracity and determine if they give rise to relief. *Id.* at 1950.

24 In the present motion to dismiss (doc. #12), defendant asks the court to dismiss all of the
 25 plaintiff’s claims except the claim for retaliation.

26 **A. Sexual Harassment, Title VII**

27 Plaintiff’s first claim for relief for sexual harassment, intended to be titled “gender

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1 discrimination,” alleges that the defendant discriminated against her on the basis of gender for filing
 2 a complaint against her manager with human resources, in violation of Title VII (doc. #8-3).

3 Specifically, plaintiff alleges that upon filing the “rumor” complaint with human resources,
 4 she was cautioned that she was “opening a can of worms” and to never use the word “harassment”
 5 when making a complaint (doc. #8-3). Furthermore, the defendant allegedly retaliated by forcing
 6 her to work in unsafe conditions, and to clean apartments in the dark with no electricity in the
 7 assigned units (doc. #8-3). Plaintiff contends that the other male employees were not subjected to
 8 such working conditions, and that she was offered no alternative position (doc. #8-3). The defendant
 9 urges the court to dismiss the claim with prejudice, arguing that Title VII does not support a claim
 10 of relief against the defendant (doc. #12).

11 There are four essential elements that the plaintiff must establish to set forth a *prima facie*
 12 claim for disparate treatment based on gender discrimination. Namely, plaintiff must show that (1)
 13 she belongs to a protected class, (2) she was performing according to her employer’s legitimate
 14 expectations, (3) she suffered an adverse employment action, and (4) similarly situated individuals
 15 not in her protected class were treated more favorably than she. *See Godwin v. Hunt Wesson, Inc.*,
 16 150 F.3d 1217, 1220 (9th Cir. 1998).

17 Here, the court agrees with the defendant that the plaintiff has not set forth a sufficient claim
 18 for relief consistent with *Twombly*, nor does her complaint establish a *prima facie* claim for disparate
 19 treatment. Moreover, plaintiff’s allegations of being treated differently as a result of reporting the
 20 rumor is a “retaliation” claim, not a claim for gender discrimination. Therefore, such allegations are
 21 subsumed in her retaliation claim and do not support a claim for gender discrimination.

22 Furthermore, even assuming that this is a gender discrimination claim and not a retaliation
 23 claim, plaintiff still fails. Plaintiff has not shown how the alleged mistreatment is plausibly
 24 connected with her gender. In her response to defendant’s motion to dismiss and countermotion to
 25 amend (doc. #8-1; 8-2), the plaintiff even conceded that another male co-worker, Mr. Drabe, was
 26 also subjected to similar mistreatment subsequent to his filing a complaint with human resources.
 27 Thus, the plaintiff has failed to show how similarly situated individuals not in her protected class
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1 were treated more favorably than she. Therefore, the court dismisses the plaintiff's first claim.

2 **B. Sexual Harassment; Hostile Work Environment**

3 Plaintiff's second claim for relief alleges that the defendant sexually harassed her, and in
 4 doing so, created an abusive and hostile working environment. An employee of the defendant
 5 allegedly spread rumors to tenants and third parties that plaintiff was a "sleazy female" because she
 6 engaged in intimate relations inside the apartments with male co-workers (doc. #8-3). Consequently,
 7 she alleges that she was forced to work in "unsafe conditions." (Doc. #8-3).

8 "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive
 9 work environment – an environment that a reasonable person would find hostile or abusive – is
 10 beyond Title VII's purview." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The victim has
 11 to subjectively perceive the environment to be abusive and a Title VII claim is actionable even if the
 12 victim or employee's psychological well-being is not seriously affected. *Id.* at 21-22. Still, the
 13 conduct must be "extreme" to amount to a "change in the terms and conditions of employment."
 14 *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

15 To assert a prima facie case of hostile work environment, a plaintiff must show that "(1) she
 16 was subjected to verbal or physical conduct of a sexual nature, (2) this conduct was unwelcome, and
 17 (3) the conduct was sufficiently severe or pervasive to alter the conditions of the victim's
 18 employment and create an abusive working environment." *Craig v. M & O Agencies, Inc.*, 496 F.3d
 19 1047, 1055 (9th Cir. 2007) (quoting *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995)).

20 Further, to prevail on a hostile work environment claim, a plaintiff must show a "pattern of
 21 ongoing and persistent harassment" severe enough to alter the conditions of employment. *Nichols*
 22 *v. Azteca Restaurant Enter. Inc.*, 256 F.3d 864, 871 (9th Cir. 2001) (citing *Draper v. Coeur*
 23 *Rochester, Inc.*, 147 F.3d 1104, 1108 (9th Cir. 1998)). In *Nichols*, the plaintiff was subjected to
 24 severe abuse consisting of a "relentless campaign of insults, name-calling, and vulgarities"
 25 throughout the plaintiff's nearly four-year term of employment. *Id.* at 870. Additionally, in *Draper*,
 26 the plaintiff was subjected to offensive comments and discriminatory treatment by a supervisor for
 27 a period of several years, and her complaints to management fell on deaf ears. *Draper*, 147 F.3d at
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1 1106-1107.

2 Here, the actions supporting plaintiff's sexual harassment and/or hostile work environment
 3 claim were not as severe or ongoing as in *Nichols* and *Draper*. The alleged "rumor," as a matter of
 4 law, is not so "severe or pervasive" as to alter conditions of the plaintiff's employment. As the
 5 Supreme Court has noted, "simple teasing, offhand comments, and isolated incidents (unless
 6 extremely serious) will not amount to discriminatory changes in the 'terms and conditions of
 7 employment.'" *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001). Thus the plaintiff's
 8 second claim is dismissed.

9 **C. Wrongful Termination**

10 Plaintiff's fourth claim for relief alleges that the defendant terminated plaintiff's employment
 11 because it was "easier" for the defendant to terminate plaintiff's employment rather than "comply
 12 with its legal obligations" (doc. # 8-3), and not because the company was eliminating plaintiff's
 13 position due to structural changes. Specifically, she alleges that her discharge was in direct
 14 contravention to Nevada's public policy because the termination occurred after filing the complaint
 15 with human resources. (Doc. #8-3).

16 The essence of a tortious discharge is a wrongful, usually retaliatory, interruption of
 17 employment by means which are contrary to the public policy of Nevada. *D'Angelo v. Gardner*, 819
 18 P.2d 206, 216 (Nev. 1991) (holding that it is violative of public policy for an employer to dismiss
 19 an employee for refusing to work under conditions unreasonably dangerous to the employee). In
 20 *D'Angelo*, the employer violated the public policy of Nevada when it dismissed the plaintiff who
 21 refused to work with cyanide because he had a healing wound in his lower abdomen and could not
 22 be exposed to the chemical. *D'Angelo*, 819 P.2d at 214.

23 Here, unlike the employee in *D'Angelo*, the plaintiff was not dismissed because she refused
 24 to work in allegedly unsafe conditions. Instead, she alleges that she "was forced to work" in these
 25 unsafe conditions only after reporting the rumor. However, she does not allege any non-consent
 26 (doc. #8-3). As in her first claim, these allegations are subsumed under the plaintiff's "retaliation"
 27 claim and do not provide a basis for her wrongful termination claim. Furthermore, even assuming
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1 that this is a proper wrongful termination claim, plaintiff again fails. Her conclusory allegation – the
 2 defendant fired me because it was “easier” – is insufficient under the plausibility *Twombly/Iqbal*
 3 standards. *See Bell Atlantic*, 550 U.S. at 570. Therefore, the court dismisses the plaintiff’s wrongful
 4 termination claim.

5 **D. Intentional Infliction of Emotional Distress**

6 Plaintiff’s fifth claim alleging intentional infliction of emotional distress is dismissed for
 7 failure to state a claim. To state a sufficient claim for intentional infliction of emotional distress, the
 8 plaintiff must allege facts showing extreme and outrageous conduct. *Star v. Rabello*, 625 P.2d 90,
 9 91-92 (Nev. 1981). “Extreme and outrageous conduct” is that which is “outside all possible bounds
 10 of decency” and is regarded as “utterly intolerable” in a civilized community. *Maduike v. Agency*
 11 *Rent-A-Car*, 953 P.2d 24, 26 (Nev. 1998) (citations omitted).

12 Here, plaintiff’s claim of intentional infliction of emotional distress arising out of the alleged
 13 rumor fails as a matter of law. This conduct does not rise to the level of “extreme or outrageous,”
 14 nor does the complaint itself state with particularity the circumstances surrounding the alleged
 15 “extreme or outrageous” nature of the conduct. *See De Los Reyes v. Southwest Gas Corp.*, 319 F.
 16 App’x. 639, 641 (9th Cir. 2009) (upholding the district court’s decision to dismiss the plaintiff’s
 17 state law tort claim of intentional infliction of emotional distress which consisted merely of
 18 recitations of legal elements and conclusory statements). These allegations do not give the defendant
 19 notice of “the grounds upon which [the claim] rests.” *Id.* (citing *Bell Atlantic*, 550 U.S. at 555).
 20 Therefore, the court dismisses plaintiff’s claim for intentional infliction of emotional distress.

21 **II. Motion to Amend**

22 Federal Rule of Civil Procedure 15(a) provides that leave to amend “shall be freely given
 23 when justice so requires.” The local rules of federal practice in the District of Nevada qualify this
 24 rule, and require that a plaintiff submit a proposed amended complaint along with a motion to
 25 amend. LR 15-1(a).

26 Plaintiff has complied with the local rules and has attached her proposed amended complaint
 27 (doc. #8-3). However, Rule 15(a) permits amendments absent a showing of an “apparent reason”
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1 such as undue delay, bad faith, dilatory motive, prejudice to the defendants, futility of the
2 amendments, or repeated failure to cure deficiencies in the complaint by prior amendment. *Moore*
3 *v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

4 Here, in plaintiff's amended complaint, she merely purports to re-title her first claim of
5 sexual harassment as "gender discrimination." However, as noted above, the re-titling does not cure
6 plaintiff's original deficiency of failure to state a claim. Therefore, her motion to amend the
7 complaint is futile, and is denied.

8 Accordingly,

9 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Tammy
10 Schoenle's motion to amend (doc. #8-3) be, and the same hereby is, DENIED.

11 IT IS FURTHER ORDERED that defendant GSL Properties, Inc.'s motion to dismiss (doc.
12 #6) be, and the same hereby is, GRANTED, WITHOUT PREJUDICE.

13 DATED June 29, 2011.

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16 UNITED STATES DISTRICT JUDGE
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